In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

NO. 34.

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, ex rel
Virginia State Bar,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR PETITIONER

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OPINION BELOW

No opinion was rendered by either the Supreme Court of Appeals of Virginia, or the Chancery Court of the City of Richmond, Virginia, other than the findings of fact by the Chancery Court, incorporated in its decree of January

29, 1962, which was affirmed by the Supreme Court of Appeals. (R 25-28)

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on June 12, 1962, (R 35), and Petition for rehearing was denied on August 21, 1962, (R. 36). The Petition For Writ of Certiorari was filed on November 9, 1962, and was granted on February 18, 1963. This Court has jurisdiction of this cause pursuant to Title 28, United States Code, Sec. 1257 (3).

THE QUESTIONS PRESENTED

(1) Whether the Brotherhood of Railroad Trainmen and it members have the right to make known to its members generally, and to injured members and survivors of deceased members in particular, first, the advisability of obtaining legal advice before making settlement of their claims, and second, the names of competent attorneys to handle such claims, and whether these rights are protected by the First and Fourteenth Amendments to the Constitution of the United States?

(2) Whether the Federal Railway Act, which authorizes the Brotherhood to represent its members generally and specifically to handle their "grievances", creates such an interest in the Brotherhood, that it has the right to make known to its members the advisability of obtaining legal advice and to make known the names of competent counsel in connection with rights of members under the Federal Employers' Liability Act, not withstanding any rule or doctrine of State law?

STATUTES INVOLVED, WITH REGULATIONS DEFINING THE PRACTICE OF LAW, AND FEDERAL CONSTITUTIONAL PROVISIONS

Code of Virginia, 1950, Sections 54-48, 54-49, 54-50, 54-51.

Section 54-83.1 of the Code of Virginia, 1950, enacted in 1954.

Sec. 54-48. Rules and regulations defining practice of law and prescribing codes of ethics and disciplinary procedure.—The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

(a) Defining the practice of law.

(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.

(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.

Sec. 54-49. Organization and government of Virginia State Bar.—The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring

all persons practicing law in this State to be members thereof in good standing.

Sec. 54-50. Fees.—The Supreme Courts of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations fixing a schedule of fees to be paid by members of the Virginia State Bar for the purpose of administering this article, and providing for the collection and disbursement of such fees; but the annual fees to be paid by any attorney at law shall not exceed the sum of ten dollars.

Sec. 54-51. Restrictions as to rules and regulations.—Notwithstanding the foregoing provisions of this article, the Supreme Court of Appeals shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys at law, which shall be inconsistent with any statute; nor shall it adopt or promulgate any rule or regulation or method of procedure which shall limit or supersede the jurisdiction of the courts to deal with the discipline of attorneys at law as provided by law; nor shall there be any rule or regulation or method of procedure adopted and promulgated which will provide for any additional method for the trial of attorneys in disbarment or suspension proceedings except those now provided for by statute, and in no case shall an attorney be tried for the violation of any rule or regulation adopted under this article except by a court of competent jurisdiction.

Sec. 54-83.1. Injunction against running, capping, soliciting and maintenance.—The Commonwealth's Attorney, or any person, firm or corporation against whom any claim for damage to property or damages for personal injuries or for death resulting therefrom,

is or has been asserted, may maintain a suit in equity against any person who has solicited employment for himself or has induced another to solicit or encourage his employment, or against any person, firm, partnership or association which has acted for another in the capacity of a runner or capper or which has been stirring up litigation in such a way as to constitute maintenance whether such solicitation was successful or not, to enjoin and permanently restrain such person, his agents, representatives and principals from soliciting any such claims against any person, firm or corporation subsequent to the date of the injunction.

PART SIX

INTEGRATION OF THE STATE BAR

I.

DEFINING THE PRACTICE OF LAW

The principles underlying a definition of the practice of law have been developed through the years in social needs and have received recognition by the courts. It has been found necessary to protect the relation of attorney and client against abuses. Therefore it is from the relation of attorney and client that any definition of the practice of law must be derived.

The relation of attorney and client is direct and personal, and a person, natural or artificial, who undertakes the duties and responsibilities of an attorney is none the less practicing law though such person may employ others to whom may be committed the actual performance of such duties.

The gravity of the consequences to society resulting

from abuses of this relation demands that those assuming to advise or to represent others shall be properly trained and educated, and be subject to a peculiar discipline. That fact, and the necessity for protection of society in its affairs and in the ordered proceedings of its tribunals, have developed the principles which serve to define the practice of law.

Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever—

(1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

(2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notice or contracts incident to the regular course of conducting a licensed business.

(3) One undertakes, with or without compensation, to present the interest of another before any tribunal—judicial, administrative, or executive— otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the

examination of witnesses or preparation of pleadings. (171 Va. XVII)

Federal Statute involved is the Federal Railway Labor Act (45 U.S.C.A. Section 151-164).

CHAPTER 8—RAILWAY LABOR ACT RAILROADS, EXPRESS AND SLEEPING CAR COMPANIES

Sec. 151. Definitions; "Railway Labor Act"

Sec. 151a. General Purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * *

Sec. 152. General Duties

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or *otherwise*, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (Emphasis supplied)

Second. Consideration of disputes by representatives

Third. Designation of representatives

Fourth. Organization and collective bargaining; free-

Sixth. Finality of decision of circuit court of appeals.

Seventh. Judgment where petitioner's contentions are sustained.

Eighth. Duty of employee to render service without consent; right to quit.

Sec. 160. Emergency Board.

Sec. 161. Effect of partial invalidity of chapter.

Sec. 162. Appropriation.

Sec. 163. Repeal of prior legislation; exception.

Sec. 164. Repealed. (Emphasis supplied)

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speach. or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. *History of the case.*

The Virginia State Bar filed its suit in the Chancery Court of the City of Richmond, Virginia, on June 29, 1959, against the Brotherhood, Bernard M. Savage of Baltimore, Maryland, Norris W. Tingle, Investigator, for the Brotherhood and alleged inter alia:

That the Brotherhood maintained a Legal Aid Department to collect information for the welfare of its members, and solicited business through its employees and members for attorneys selected and designated as Legal Counsel.

The solicitation was conducted as follows:

> When lodge members were injured or killed in the course of employment * * * secretaries or some other member, notified the Legal Aid Department of the injury or death; * * * in many cases both the lodge to which the injured man belongs * * * acting through its Regional Investigator advised the injured person or his family * * * that the claim against the * * * employer should not be settled without consulting * * * Legal Counsel; * * * (R 1, 2, 3, 4).

That Legal Counsel handled the claims on a contingent fee fixed by the Brotherhood, and together with other Legal Counsel, he supported the Legal Aid Department.

It was further alleged that the Brotherhood, Savage, as Legal Counsel for an area including Virginia, and Tingle, as Investigator, were engaging in such practices in the City of Richmond, and the Commonwealth of Virginia, and that said practices constituted the unauthorized practice of law in Virginia by each of the defendants. (R 1, 2, 3, 4)

The Brotherhood admitted in its answer that prior to April 1, 1959, Legal Counsel handled cases for injured members and estates of deceased members, on contingent fee basis, and that Legal Counsel made contributions to the Department of Legal Counsel. (R 4, 5, 6)

The Brotherhood alleged in its bill of particulars and showed by evidence that after April 1, 1959, it eliminated the objectionable practices, as alleged, because the Supreme Court of Illinois had determined the practices objectionable in a suit filed for declaratory judgment by the Brotherhood.[1] (R 7, 8, 9, 50, 51, 52, 57, 58, 59, 131)

The Brotherhood by its amended answer, and by written motion to strike plaintiff's evidence, alleged that the practices in which it was engaged did not constitute the practice of law, and further, that it had the right to make available investigative reports of accidents to an injured member or his survivors; and in addition, it had the right to inform a member to consult and employ an attorney to protect his rights, and that these rights were protected by the First and Fourteenth Amendments to the Federal Constitution. (R 12, 13, 22, 23)

The Bar introduced in evidence certified copies of records

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[1] In re Brotherhood of Railroad Trainmen, 13 Ill (2d) 391, 150 N.E. (2d) 163.

of suits in Ohio and New York against Regional Counsel of the Brotherhood, showing the fee arrangements of counsel to be 25% of anything recovered for a member, with 5% of same being paid by Counsel to the Legal Aid Department for its support.[2] (R 465, 471-72, 484, 800)

The Bar also introduced in evidence copies of records of suits involving the plan of operation by the Petitioner in several states, which included Illinois, Oklahoma and Missouri.[3] (Plf.'s Exs. 27, 29, 30; R 492, 493, 495, 496, 855, 857, 859) The decrees in the Oklahoma and Missouri cases were consent decrees, and should not have been admitted in evidence over Petitioner's motion to strike.

The allegations in the suits in Illinois, Oklahoma and Missouri showed that the plan of operation of the Legal Aid Department had been modified subsequent to the cases in Ohio and New York, and was identical with the plan as alleged by the Bar herein.

The Bar did not introduce any evidence to specifically show the plan of operation of the Brotherhood in Virginia prior or subsequent to the date of its suit. However, the Court found as a fact:

> that there is reasonable ground of apprehension that this plan and course of conduct will in furtherance of the defendant Brotherhood's avowed purpose, be

[2] In re Petition of the Committee on Rule 28 of the Cleveland Bar, 15 Ohio L. Abs. 106 (Ct. App 1933)
In re O'Neill, 5 F Supp 465 (E.D. NY 19)

[3] In re Brotherhood of Trainmen, supra; State of Okla ex rel Okla. Bar Assn. v. Brotherhood of Railroad Trainmen.
Fred B. Hulse et al v. Brotherhood, 340 SW (2d) 404-15.

adopted and put into effect in the City of Richmond within the jurisdiction of the Court. (R 25, 26, 27, 28)

In an elaborate decree, after making certain findings of fact, the lower Court enjoined the Brotherhood, its officers, agents, servants, employees and its members, acting in its behalf, among other things:

> from holding out lawyers selected by it as the only approved lawyers to aid the members or their families * * * or in any other manner soliciting or encouraging such legal employment of the selected lawyers * * * and from formulating and putting into practice any plan, pattern or design, the result of which is *to channel legal employment to any particular lawyer or group of lawyers* * * * and, in general, from violating the laws governing the practice of law in the Commonwealth. (R 25, 26, 27, 28) (Emphasis supplied)

Whereupon, Petitioner brought the cause to this Court.

2. Material Facts Concerning the Organization and Character of the Petitioner and the Operation of its Department of Legal Counsel.

The Petitioner is a railway labor organization composed of a Grand Lodge with subordinate lodges, and obligated in its relationship with railroad employers by the terms of the Railway Labor Act, and all other pertinent acts of the Acts of Congress.[4] (Plf. Exhibits 1, 17, 18, 19, 20,

[4] Federal Railway Labor Act (45 U.S.C.A. Sections 151-164) In re Petition of Committee on Rule 28 of Cleveland Bar, 15 L.Abs. 106

27; R 439, 443, 460, 464, 465, 481, 484, 493, 495, 496, 733, 800, 825)

The Petitioner is a labor organization not for profit, composed of members engaged in hazardous occupations and bonded together for mutual protection and advancement.[5] (Plf. Exhibits 1, 17, 18, 19, 20, 27; R 439, 443, 460, 464, 465, 481, 484, 733, 800, 813, 825)

3. *The Reasons For Establishing the Legal Aid Department.*

The Brotherhood, after investigating accidents of members and settlement of their claims, found they had fared rather badly at the hands of railroad claims agents, and further, that sometimes its members fell into the hands of incapable, indolent, inexperienced or dishonest lawyers with resulting loss to claimants. It also found the compensation exacted by lawyers was too much. To protect its 200,000 members, who were engaged in hazardous work, the officers of the Brotherhood recommended the establishment of the Legal Aid Department.[6] (Plf. Exhibits 12, 12A, 17; R 457, 465, 779)

4. *Legal Aid Department Established.*

The Petitioner established in 1930 its Legal Aid Department, now named Department of Legal Counsel, after

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[5] Inf re Petition of Committee on Rule 28 of Cleveland Bar, 15 L.Abs. 106
In re Ryan v. Pennsylvania, 268 Ill App 364, 373.

[6] In re Brotherhood of Railroad Trainmen, 13 Ill (2d) 391, 150 N.E. (2d) 163.
In re Petition of Committee on Rule 28 of Cleveland, 15 L.Abs. 106.

a referendum questionnaire and a majority vote from the members of the lodges of The Trainmen in the United States. The Legal Aid Department is subject to the provisions of the Constitution of the Brotherhood and authority of its President. (Plf. Exs. 1, 4, 12, 14; R 39, 40, 439-40, 457-58, 733, 751-52, 756-60, 779)

The Department of Legal Counsel maintains a central office in Cleveland, Ohio, and it has a staff consisting of a chief clerk and stenographer. (R 130) Formerly it had a number of regional investigators and a larger staff.[7] (R 122, 859)

In the early part of 1961, regional investigators were discontinued by the Brotherhood, and the secretaries of the various lodges, who reported accidents in compliance with the Constitution of the Brotherhood, made investigation of accidents when requested to do so by Petitioner. (R 65, 66, 69, 71, 106, 121, 124)

Operating in conjunction with the Department of Legal Counsel are approximately sixteen lawyers, each designated by the Brotherhood as Legal Counsel. While most of the lawyers are members of the Brotherhood, membership is not a prerequisite to becoming Legal Counsel. (R 64, 65)

Legal Counsel must be qualified to handle claims of injured members under the F.E.L.A. and Safety Appliance Act, and generally qualified to handle other legal matters for the Brotherhood. (R 64)

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[7] Hulse, et al v. Brotherhood of Railroad Trainmen (Mo) 340 SW (2d) 404-15.

5. *Evidence Adduced at the Trial.*

A. PETITIONER FILED SUIT FOR DECLARATORY JUDGMENT.

A suit for declaratory judgment was filed by the Petitioner in the Supreme Court of Illinois to determine its rights in the protection of its members when injured or killed in railroad accidents.[8] (Plf. Ex. 27; R 57, 58, 59, 60, 856, 857)

B. THE SUPREME COURT OF ILLINOIS APPROVED THE FOLLOWING ACTIVITIES OF THE PETITIONER.

1. Brotherhood may maintain a staff to investigate injuries of its members.

2. Brotherhood may make the reports of those investigations available to an injured man or his survivors.

3. Brotherhood may also make known to its members generally, and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making settlement, and second, the names of attorneys who in its opinion, have the capacity to handle such claims successfully. (R 57, 58, 59, 60)

THE ILLINOIS COURT DISAPPROVED THE FOLLOWING ACTIVITIES

1. Employees of Brotherhood may not carry contracts

[8] In re Brotherhood of Railroad Trainmen, 13 Ill (2d) 391, 150 N.E. (2d) 163.

for employment of any lawyer, or photostats of settlement checks.

2. No financial connection of any kind between the Brotherhood and any lawyer is permissible.

3. No lawyer can properly pay any amount whatsoever to the Brotherhood or any of its departments, officers, or members as compensation, reimbursement of expenses or gratuity in connection with the procurement of a case.

4. Nor can the Brotherhood fix the fees to be charged for services to its members. The relationship of the attorney to his client must remain an individual and a personal one.

C. THE PETITIONER IS IN COMPLIANCE WITH THE ILLINOIS DECISION.

The evidence shows that, since the Illinois opinion, the Brotherhood no longer receives contributions from Legal Counsel; for the support of its Department of Legal Counsel, nor does it set the fee to be charged for services rendered its members. (R 57, 58, 59, 60, 128, 129, 130, 131)

D. THE PETITIONER NOTIFIED ALL LEGAL COUNSEL AND ITS INVESTIGATORS TO COMPLY WITH THE DECISION OF THE ILLINOIS COURT.

After the opinion in the Illinois case, the Petitioner's President notified Legal Counsel and its Investigators to comply with the decision. (R 50, 51, 52, 128, 129, 130, 131, 958, 959)

E. PETITIONER'S MEMBERS MAY EMPLOY COUNSEL OF THEIR OWN CHOOSING.

The evidence shows that Petitioner's members may employ Legal Counsel of the Brotherhood or an attorney of their choice, and negotiate the fee to be paid the attorney. (R 63, 164, 187, 756, 757, 758, 759, 760, 761, 762, 763)

F. CONTROL OF LITIGATION.

The Petitioner's purpose is to make competent counsel available to injured members and families of deceased members and thereafter the member and his attorney control the litigation. The rules and regulations in force prior to the Illinois case provided that when lawyer-client relationship was established between a member and his attorney, then all actions thereafter were taken by the member and his attorney. (Plf. Ex. 5; R 62, 63, 64, 756, 757, 758, 759, 760, 761, 762, 763)

G. ACCIDENT INVESTIGATIONS.

Accident investigations were made by the Petitioner for two purposes. First, to use the evidence secured to assist an injured or family of a deceased member, and second, to use the evidence in hearings before the Interstate Commerce Commission, so that railroad safety laws might be improved. (R 45, 62, 63, 64, 67, 68)

SUMMARY OF ARGUMENT

The Petitioner is a non-profit, membership labor organization, having an interest in the welfare of its injured members, this being inherent in the very nature of the organization, which was originally formed to protect rail-

road employees and their widows from the disastrous consequences of railroad injuries and deaths. In that era, the average life expectancy of a switchman in 1893 was 7 years. Griffith, The Vindication of a National Public Policy under the Federal Employees' Liability Act, 18 Law and Contemporary Problems, 160 at 63. The early organization was fraternal and for the purpose of providing insurance benefits to members totally disabled, or to the next of kin of members killed in railroad services.

The interest of Petitioner in its members is personal, not pecuniary. It is but the medium through which its individual members seek to more effectively protect injured members and families of deceased members. See: Harrison v. NAACP, 360 U.S. 167, 79 S.Ct. 1025, 1030, 3 L.ed. (2d) 1152.

There is a community of interest between the Petitioner and its members, and in every practical sense they are identical. NAACP v. Alabama, ex rel Patterson, 357 U.S. 449, 459, 78 S.Ct. 1163, 1176, 2 L.ed. (2d) 1488.

The activities of the Petitioner and its members in the operation of Department of Legal Counsel are but modes of expression and association which are protected by the First and Fourteenth Amendments of the Federal Constitution. NAACP v. Button, 371, U.S. 415.

It cannot be shown that the enjoining of Petitioner's activities bear any reasonable relation to the end of maintaining the integrity of the judicial process or the ethical standards of the legal profession, or that there is a compelling state interest within the state's constitutional powers. Therefore, the decree herein is violative of the First Amendment freedoms and of the due process and equal protection clause of the Fourteenth Amendment of the

Federal Constitution. NAACP v. Button, 371 U.S. 415. Cf Schwane v. Board of Bar Examiners, 353 U.S. 232, Konigsberg v. State Bar of California, 353 U.S. 252; Nebbie v. N.Y., 291 U.S. 502; Skinner v. Okla., 316 U.S. 585.

For the reasons aforesaid, the Petitioner contends that the decree herein denies due process and equal protection to it, its members and Legal Counsel under the Fourteenth Amendment of the Federal Constitution, and violates rights which are protected under the First Amendment of the Federal Constitution, and the Railway Labor Act.

ARGUMENT

(1) Whether the Brotherhood of Railroad Trainmen and its members have the right to make known to its members generally, and to injured members and survivors of deceased members in particular, first, the advisability of obtaining legal advice before making settlement of their claims, and second, the names of competent attorneys to handle such claims, and whether these rights are protected by the First and Fourteenth Amendments to the Constitution of the United States?

I.
CASES ARISING UNDER THE PLAN OF THE BROTHERHOOD

Many cases concerning the plan of the Brotherhood have arisen in various states. Some of these shall be discussed hereafter.

In re Petition of Committee of Rule 28 of Cleveland Bar Association, 15 Ohio L.Abs. 106, which was an injunction

and disciplinary action against Regional Counsel of the Brotherhood, the Court refused to enjoin counsel, but in a 2 - 1 decision, it reprimanded Regional Counsel. Justice Levine dissented, saying in part:

> I am constrained to dissent from the decision of the majority of this Court for the reasons hereinafter set forth.
>
> A careful review of the evidence makes it apparent that the charge lodged against the appellants is purely technical. It is not claimed by the Cleveland Bar Association Committee that the appellants are engaged in what is ordinarily termed "ambulance chasing". Such a claim would be emphatically refuted by the evidence. The technical charge is that the appellants violated Rule 28 of the Supreme Court and of the canon of ethics, by reason of their acting as Regional Counsel for the Brotherhood of Railroad Trainmen, it being alleged that the Legal Aid Department of the Brotherhood of Railroad Trainmen, is, in its nature, a soliciting organization, and that therefore, when the appellants undertake to represent any member of the Brotherhood of Railroad Trainmen, who are referred to them by the Legal Aid Department, they do so in violation of Rule 28 of the canon of ethics.
>
> The record discloses certain undisputed facts which I shall enumerate.
>
> 1. The Brotherhood of Railroad Trainmen is the largest single labor organization in the world, having a membership of 175,000 and its executive officers are located in Cleveland.
>
> 2. The Brotherhood of Railroad Trainmen, through its legislative representative at Washington, was largely instrumental in securing the passage of the

Federal Employers' Liability Act, the Safety Appliance Act and other national remedial legislation applying to Railroad Trainmen.

3. Beginning with the convention of 1916, the Brotherhood of Railroad Trainmen passed the necessary resolution for the establishment of a Legal Aid Department, which was designated to protect its members and to secure for its injured members or the widows of members killed in railroad service, the full benefits of the remedial Federal Acts.

* * *

5. President A. F. Whitney of the Brotherhood of Railroad Trainmen caused a thorough investigation to be made in 1928 and 1929, after a plan had been carefully considered by several committees of the Brotherhood, the plan was submitted to a vote of the lodges and the formation of the Legal Aid Department was approved by an almost unanimous vote and finally the Legal Aid Department of the Brotherhood started to function on or about the 1st day of May, 1930.

In view of the conflicting opinion among two groups of lawyers constituting the committee on Rule 28 of the Cleveland Bar Association as to whether the conduct of the appellants is a violation of Rule 28, it may be necessary for the Supreme Court to add something by way of clarification to Rule 28. Until that time, the appellants cannot in all fairness be charged with the unethical conduct such as to justify a reprimand on the part of this court or any other court.

In Ryan v. Pennsylvania R. Co., 268 Ill. App. 364, 373 (1932), the Defendant contended, among other things, that the contract between Regional Counsel and his client,

who was a member of the Brotherhood, was unenforceable because it was secured by solicitation, which violated public policy. The Court made a clear distinction between legal aid and unlawful soliciting, which bears quoting in this connection.

> After a careful consideration of all the facts we are satisfied that these contentions and arguments are without merit, and we feel impelled to say that the assertion that the Brotherhood, through its legal aid department, is akin to an ambulance chaser and that the petitioner was a beneficiary of an unethical and unlawful system of obtaining clients, is unworthy of the able lawyers that made it. The Brotherhood is a labor organization, composed of men engaged in hazardous occupations and who are banded together for mutual protection and advancement. The evidence established that it organized the legal aid department for the sole purpose of protecting its injured members or their families * * *. The evidence, introduced by the respondent, shows clearly the worthy purpose of the department and the necessity for its organization and maintenance.

Subsequent to the Ryan Case, the Illinois Legislature enacted a statute[9] making it unlawful for a person, not

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[9] 13-15 of Illinois Revised Statute

It shall be unlawful for any person not an attorney at law to solicit for money, fee * * or other remuneration * * any demand for personal injury or death.

13-16 Violation Penalties

13-17 of Illinois Revised Statute, 1961 reads:

Any contract of employment of an attorney obtained or made as a result of a violation of this act shall be void and unenforceable. (July 11, 1957, p. 2587, Sec. 3)

an attorney, to solicit for money or other remuneration any personal injury claim. The Court applied the statute in the case of In re Brotherhood of Railroad Trainmen, infra.

In re Brotherhood of Railroad Trainmen, 13 Ill. (2d) 391, (1957), 150 N.E. (2d) 163, the Brotherhood filed suit for declaratory judgment, with the participation of the Illinois State and Chicago Bar Associations, and a group of twenty-seven railroad companies. The Court did not approve the plan as it was then operating, but did give directions to the Brotherhood in its opinion as follows:

> What has been said would ordinarily be sufficient. The Brotherhood, however, has frankly and openly placed its problem and its own solution of it before the court, and asked for guidance. We think, therefore, that it is appropriate to indicate in broad outline what the Brotherhood may do with respect to the injury and death claims of its members.
>
> The objective of the Brotherhood in seeking to secure competent legal representation of its members can be accomplished without lowering the standards of the legal profession. The Brotherhood has a legitimate interest in investigating the circumstances under which one of its members has been injured. That interest antedates the occurrence of any particular injury. We are of the opinion that the Brotherhood may properly maintain a staff to investigate injuries to its members. It may so conduct those investigations that their results are of maximum value to its members in prosecuting their individual claims, and it may make the reports of those investigations available to the injured man or his survivors. Such investigations

can be financed directly and without undue burden by the 218,000 members of the Brotherhood.

The Brotherhood may also make known to its members generally, and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making a settlement, and second, the names of attorneys who, in its opinion, have the capacity to handle such claims successfully.

Thus, the Illinois Court recognized that if the Brotherhood adhered to the principles and directions set out in its opinion, there would be no conflict of interest which statutes and codes of ethics seek to prevent.

Subsequent to the Illinois opinion, the Supreme Courts of Missouri[10] and Oklahoma[11] heard cases involving the plan of the Brotherhood, and the Oklahoma Court incorporated the Illinois opinion in its decree as though fully set out therein.

In re O'Neill, 5 F. Supp. 465, was a disciplinary action against Regional Counsel under the plan of the Brotherhood. Although the evidence showed that the Brotherhood and its members referred cases to Regional Counsel, the Court directed its attention to the sole question of the fee splitting arrangement and held that O'Neill would not be permitted to proceed with the cases he was handling, until he had filed an affidavit in each case showing that

[10] Hulse, et al v. Brotherhood of Railroad Trainmen, 340 SW (2d) 404-15.

[11] State of Okla., ex rel Okla. Bar Assn. v. Brotherhood of Railroad Trainmen, Plf. Ex. 29 (R 855).

the contract with the Brotherhood had been rescinded, and the Brotherhood no longer received any part of his fee.

The Court said:

> As to so much of the union activity this Court is prepared to believe that the organization was performing a *valuable service to its members.* (Emphasis supplied)

In the case of Hildebrand v. State of California, 36 Cal. (2d) 504, 225 P. (2d) 508 (1950), which was a disciplinary suit against Regional Counsel, alleging unethical solicitation under the legal aid plan of the Brotherhood, the charges were sustained; however, Justices Carter and Traynor vigorously dissented.

Justice Carter in describing the plan of the Brotherhood said in part:

> The Brotherhood here involved is an organization composed of persons, who are protected by the Federal Employers' Liability Act, supra, and their employees are subject to its provisions. *Hence there is a manifest community of interest* between the employee and their organization, which justifies the latter in *the procurement of legal aid investigation services, all of* which directly ties in the rights and remedies established by the *F. E. L. A.*
>
> *Thus, we do not have a case where the purpose, motive and result is stirring up of litigation* * * *. It is nothing more than a proper *joining of forces* for the

accomplishment of a proper legal objective of mutual protection. (Emphasis supplied)

Justice Traynor said:

> There are situations, however where an attorney's association with a lay organization fulfills a legitimate interest of the organization or its members and *presents no conflicting interest or other abuses.* Such arrangements may be tolerated even when lay agency is actively engaged in soliciting business as liability insurance companies. The Brotherhood attorneys bear the same relation to members as an insurance defense attorney does to the insurance company. * * * Referring associations make the referrals, not for compensation but solely to help its members secure legal assistance. The essential objective of the instant plan is not to obtain clients for an attorney. It is to enable the organization (the Brotherhood) to assist its members in a matter of vital concern to them. It does not urge its members to avail themselves of the service in order to bring business to the counsel, or stir up litigation. (Emphasis supplied)

The Illinois Court, in the Brotherhood Case, recognized the problems of the Brotherhood in endeavoring to protect its injured members, and established a new and enlightened policy toward the plan of the Brotherhood, and inferentially held that Canon 35 did not apply to the Brotherhood. However, in taking this forward step, the Court did not lower the ethical standards of the legal profession.

Mr. Henry S. Drinker, who was Chairman of the American Bar Association Committee on Legal Ethics

when it adopted Canon 35, is of the opinion that no support for proscribing such referrals, as in the instant case, can be found in present Canon 35, and would himself prefer to have the Canon revised to permit even an arrangement whereby unions, and corporations, may employ lawyers to render free legal services to their members, or employees, as individuals.

Mr. Drinker said, in his well-known treatise:

> It is not believed that the Canon (35) will prevent the labor unions from finding lawyers to advise their members. The whole modern tendency is in favor of such arrangements, including particularly employer and cooperative health services, the principles of which, if applied to legal services would materially lower and spread the total cost to the lower income groups. The real argument against their approval by the bar is believed to be loss of income to the lawyers and concentration of service in the hands of fewer lawyers. These features do not commend the profession to the public. Drinker, *Legal Ethics* 167 (1953) (footnotes omitted).

The following commentaries on the BRT case (13 Ill. (2d) 391) are unanimous in the view that legal ethics permit rather than prohibit an association's referral of its members to an attorney who represents the association, where the attorney's compensation is derived exclusively from the referred member and is dependent upon the voluntary arrangement between the attorney and the referred member:

(1) Note, 53 N.W. U.L.Rev. 276, 279 N. 14 (1958)

> The decision has focused attention on the clash between the interest of the members of the Brotherhood in securing adequate counsel to prosecute personal injury claims against railroads, and the interest of the legal profession in maintaining higher standards of professional conduct. The unusual approach taken by the court represents a significant step in the direction of an accommodation of these conflicts.
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> * * *
>
> No cases can be found which hold that attorneys who accept employment with members of an organization, by virtue of the recommendation of such organization are violating canon 35. * * *

(2) 47 Ill. Bar J. 410, 416 (1958)

> Mere referral by an organization of one of its members to an attorney solely because of the organization's belief in the attorney's competence, has never been regarded as a breach of the canons, so long as no financial arrangement exists between the attorney and the organization. * * *

In re: Seidman, 240 N.Y.S. (2d) 592 (App. Div. 1930), the Court, in dismissing disciplinary proceeding brought against an attorney on the ground of solicitation, held at page 594-595:

> In the case of William A. Cookley, it is clearly established that there was no solicitation of his case by respondent, but that he was recommended to Cookley by Walter Carr, the delegate and business

agent of the Int. Longshoremen's Assoc; that such recommendation was in line of his duty as walking delegate; that he knew both Cookley and respondent; and that he called upon respondent's office on the telephone, told the latter's employee that one of his men had been injured, gave Cookley's name and address, and asked that respondent take care of the case. What followed was the result of this action by Carr, and, no improper act by respondent is proved.

Also see 20 Pitts Law Review 85, and 107 U. Pa. L. Rev. 387, 398 (1959), for a comprehensive analysis of cases involving the problems and activities of the Brotherhood in the operation of its Department of Legal Counsel.

II.

THE ACTIVITIES OF PETITIONER AND ITS MEMBERS IN THE PRESENT OPERATION OF THE DEPARTMENT OF LEGAL COUNSEL, INCLUDING THE ACTS DESCRIBED IN THE DECREE "AS HOLDING OUT LAWYERS", "AS SOLICITING" AND "OR ENCOURAGING LEGAL EMPLOYMENT OF SELECTED LAWYERS" ARE MODES OF FREE EXPRESSION AND ARE PROTECTED CONSTITUTIONALLY.

In 1956 Virginia amended the provision of its Code forbidding solicitation of legal business in the form of running and capping.[12] Virginia also by statute authorizes

[12] Chapters 33 and 36, Acts of Assembly, Ex. Sess., 1956, codified as Code of Virginia, 1950, Sections 54-78, 54-79, 54-82, 54-83. The Supreme Court of Appeals declared Chapter 36 of Acts of Assembly invalid in NAACP v. Harrison, 202 Va. 154, 116 SE (2d) 65; and this Court declared Chapter 33 invalid in NAACP v. Button, 371 U.S. 415.

injunction suits for running and capping.[13] In addition, the Supreme Court of Appeals of Virginia has the right by statute to prescribe, and adopt rules and regulations defining the practice of law.[14]

Respondent in its brief in opposition to the Petition for Writ of Certiorari, said:

> Respondent did not rest its case on the Virginia statute defining and regulating the practice of law.

The complaint in the instant case does not indicate law principle, statute, canon of ethics, or rule of court, in support of its claim that the activities of the Brotherhood, Savage, as Legal Counsel, and Tingle, as Investigator, constitute the unauthorized practice of law. It appears likely that Respondent relies upon the Canons of Professional Ethics, 35 and 47[15], and/or the Court's "inherent power, apart from statute, to inquire into * * * unau-

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[13] 54-83.1, code of Va., 1950, supra.

[14] Sections 54-48, 54-49 of the code of Virginia, 1950.

[15] 171 Va. pp XXII-XXXIII, XXXV (1938). Canon 35 reads in part as follows: "*Intermediaries.*—The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes, between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries." Canon 47 reads as follows: "*Aiding the Unauthorized Practice of Law.*—No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

thorized practice * * *" .(Richmond Assn. of Credit Men v. Bar Assn., 167 Va. 327-335-336)

However, it is clear that the claim for relief is not founded upon any law "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." Cantwell v. Connecticut, 310 U.S. 296, 311; Thornhill v. Alabama, 310 U.S. 88, 105.

This Court has recently reviewed the cases and commentaries defining "Unlawful Solicitation" of legal business, common law barratry, maintenance and champerty in NAACP v. Button, 371 U.S. 415.

To the extent, if any, that the Bar here relies upon the Canons, then the case of NAACP v. Button, supra, has already decided that both the Canons and the Statute involved in that case were too vague to be applied to the area of free speech. See: NAACP v. Button, 371 U.S. at 429 and 432-438. It is also clear that any common law conception of the unauthorized practice of law is subject to the same objection, for the Court said in NAACP v. Button, that,

> Broad prophylactic rules in the area of free expression are suspect,

and that

> Precision of regulation must be the touch stone in an area so closely touching our most precious freedoms.

See: NAACP v. Button, 371 U.S. at 438. As pointed

out in Thornhill v. Alabama, 310 U.S. 88, the vice of such laws is that they are potently capable of many unconstitutional applications thus stifling and deterring free expression.

The Bar's case here is substantially weaker than the State's case in NAACP v. Button, supra. That case involved a criminal law that would impose punishment only after unlawful expression, but in the instant case the Bar seeks an injunction which would impose a "previous restraint" on expression. See: Thomas v. Collins, 323 U.S. 516, 518; Near v. Minnesota, 283 U.S. 697, 711-716, both invalidating injunctions against free expression as unlawful "previous restraints."

This Court further said in NAACP v. Button, that abstract discussion is not the only species of communication which the Constitution protects; that the First Amendment also protected vigorous advocacy of lawful ends against governmental intrusion. Thomas v. Collins, 323 U.S. 516, 537, 65 S.Ct. 315, 325, 89 L.ed. 430; Herndon v. Lowry, 301 U.S. 242, 259-264, 57 S.Ct. 732, 739-742, 81 L.ed. 1066. Cf Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.ed. 1213; Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.ed. 1117; Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.ed. 1131.

This Court also said that the Sherman Act did not apply to certain concerted activities of railroads "at least insofar as those activities comprise mere solicitation of governmental action with respect to the passage and enforcement of laws" because "such a construction of the Sherman Act would raise important constitutional questions," specifically, First Amendment questions. Eastern R.R. Presi-

dents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138, 81 S.Ct. 523, 530, 5 L.ed. (2d) 464.

This Court further said in the NAACP case 371 U.S. 415:

> * * * that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. * * * For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.ed. 2d 796; Konigsberg v. State Bar, 353 U.S. 252, 77 S.Ct. 722, 1 L.ed. 2d 810. Cf. in re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.ed. 2d 1473. In NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 461, 78 S.Ct. 1163, 1471, 2 L.ed 2d 1488, we said "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." Later, in Bates v. Little Rock 361 U.S. 516, 525, 80 S.Ct. 412, 4 L.ed 2d 480, we said, "where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Most recently, in Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 297, 81 S.Ct. 1333, 1336, 6 L.ed. 2d 301, we reaffirmed this principle:" * * * regulatory measures * * * no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."
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> * * *

> Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation.[16] And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious. Even most modern, subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar; regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest.[17]

The instant case and the NAACP case are similar. Both are non-profit organizations, with members, and designated lawyers. The NAACP advocates and finances litigation, including the payment of attorney's fees. The Brotherhood advises its injured members to obtain legal advice before making settlement of their claims and suggests names of attorneys to handle their claims, but it does not try to control litigation of its members. The sole

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[16] See e.g., Commonwealth v. McCulloch, 15 Mass. 227 (1818); Brown v. Beauchamp, 5 T.B.Mon. 413 (Ky 1827); Perkins, Criminal Law, 449-454 (1957); Note, 3 Race Rel. 1257-1259 (1958).

The earliest regulation of solicitation of legal business in England was aimed at the practice whereby holders of claims to land conveyed them to great feudal lords, who used their power or influence to harass the titleholders. See Winfield, the History of Conspiracy and Abuse of Legal Procedure, 152 (1921).

[17] See Comment: A Critical Analysis of Rules against Solicitation by lawyers, 25 U. of Chi. L. Rev. 674 (1958). But truly nonpecuniary arrangements involving the solicitation of legal business have been frequently upheld. * *

purpose and motive of the Brotherhood is to assist its members in a matter of vital concern to them; and it has no desire to stir up litigation, or to obtain clients for an attorney.

There is nothing in the plan of the Petitioner which requires its members to employ an attorney, who is recommended to the member. The member may employ an attorney of his own choosing.

The State Bar introduced the following witnesses, who testified on direct examination on this subject:

Clifford D. Olson (R 164):

By Mr. Beal:

Q. Now, Cliff, would you relate in your own words to the best of your recollection what, if anything, Mr. Clinkenbeard and Mr. Ballieu said to you at the time they contacted you at the hospital?
A. Well, they informed me that they were representatives, which I knew Ballieu was, of the railroad Brotherhood of Trainmen, and advised me of rights under the by-laws of the Brotherhood of Trainmen.

Q. And what else, if anything, was said by them?
A. Well, they informed me that I could use legal aid if I so wanted to do so.

Bettie J. Olsen (R 187)

By Mr. Beal:

Q. I'd like to ask one more question. Mrs. Olsen, you testified that Mr. Clinkenbeard advised you that you

could hire some other lawyer if you wanted to, is that correct?
A. Yes.

Q. Did he express any definite preference to you as to who you should hire or retain?
A. I can't remember.

William P. Kennedy (R 63)

By Mr. Bowles:

A. * * * *And so the individual knows very little about his legal rights, and so all we do is to notify them as to their legal rights and suggest that they confer with a competent and qualified attorney for further handling.*

* * *

Q. Yes. *Now, then you also advise him that he can have the services of your selected counsel whom you deem competent if he wants them?*
A. *If he chooses to do so, yes, sir.*

Q. That is right. Now, in the serious cases you advise him to get your counsel, don't you?
A. *We suggest that if he is interested he can go to our counsel. He doesn't necessarily have to use our counsel.*

Q. But you do advise him to do that?
A. If he wants to. *We don't force him to do it if that's against his will. He can go to any counsel he chooses to do so.* (Emphasis supplied).

The Bar's Exhibit 5, which covers the Rules and Regulations Governing Relations of Regional Counsel and the

Brotherhood of Railroad Legal Aid Department, which was in force prior to the Illinois Case reads in part: (R 762)

> In cases where members have exhausted their efforts in attempts to procure settlement, they will be referred to regional attorneys, with whom contracts may be made for the prosecution of their claims. *It must be understood that (fol. 572) the Brotherhood cannot undertake to control the actions of members in this regard, and that they will remain free to employ attorneys of their own choice.* (Emphasis supplied)

Can it be said that when the Brotherhood recommends to its injured members, having claims under a federal statute, that they consult Legal Counsel, it is urging "recourse to the courts for private gain" and is serving "no public interest"? Clearly there is no "private gain" to the Brotherhood, nor can such a suit, for compensation, be seriously considered as one for the "private gain" of an injured member or his next of kin. And since a workman's compensation statute is not available to him, can it be said that a suit under the FELA by an injured member, or his survivor, is "the use of legal machinery to oppress"? Is not the litigation process expressly sanctioned by this federal statute, or does the federal sanction stop short at the courthouse door?

As for the question concerning the control of litigation through the intervention of a lay intermediary, the majority said in the NAACP case:

> There has been no showing of a serious danger here of professionally reprehensible conflicts of interest

which rules against solicitation frequently seek to prevent * * *. *Id.* at 442-443.

Under the Brotherhood plan, there is no conflict of interest as between the Brotherhood and the injured member, and therefore, no danger that Legal Counsel will be faced with conflicting allegiances. Furthermore, under the Brotherhood plan, unlike the NAACP plan, counsel is compensated by the client, and there is no interference whatever with the traditional attorney-client relationship.

III.

THE DECREE BELOW ENJOINS OTHER ACTIVITIES OF THE BROTHERHOOD WHICH ARE PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The lower courts also expressly forbade the Brotherhood, its officers, agents, servants and employees and its members acting in its behalf

> from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which was *to channel legal employment to any particular lawyer or group of lawyers.* (Emphasis supplied)

The Court did not define the word "channeling" in its decree; therefore, we must look to Webster's New World Dictionary for a definition of the word "channeling":

> Any means of passage; *course through which some*

thing moves or passes; the proper or official course of transmission of communication, as in the Army. (Emphasis supplied)

The decree, which was affirmed by the Supreme Court of Appeals, is so broad that if several members of the Brotherhood were injured in the same train accident, and by chance occupied the same hospital room, the Brotherhood, its officers or members acting in its behalf could not advise the injured members to seek assistance of any particular lawyer or group of lawyers for this would be channeling legal business.

In addition, the decree proscribed any arrangement by which the Brotherhood, its officers, agents, servants and employees and its members acting in its behalf, could advise members to seek the assistance of particular attorneys. In this respect the decree is similar to the decree in NAACP v. Button, supra.

The Brotherhood and its members are in every practical sense identical. NAACP v. Alabama, ex rel Patterson, 357 U.S. 449, 459, 78 S.Ct. 1163, 1176, 2 L.ed. 2d 1488. It is but the medium through which its individual members seek to more effectively protect injured members and also families of its deceased members. See: Harrison v. NAACP, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.ed. 2d 1152.

The activities of the Petitioner and its members in the operation of the Department of Legal Counsel are but modes of expression and association which are protected under the First and Fourteenth Amendments. NAACP v.

Button, supra; Gibson v. Florida, 371 U.S. 539, 31 Law Week 4311, NAACP v. Alabama, 357, U.S. 449; Bates v. Little Rock, 361, U.S. 516; Shelton v. Tucker, 364 U.S. 479.

The decree herein limits all freedom of expression when directed to the protection of injured members and families of deceased members, and this Court said in Thomas v. Collins, 323 U.S. 516, 537, 65 S.Ct. 315, 326. 89 L.ed. 430:

> "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." Thomas was convicted for delivering a speech in connection with an impending union election under National Labor Relations Board auspices, without having first registered as a "Labor organizer". He urged workers to exercise their rights under the National Labor Relations Act and join the union he represented.

This Court held that the registration requirement as applied to his activities was constitutionally invalid.

The differences between the NAACP plan and the Brotherhood plan need not be belabored. Suffice it to say, it is apparent from the minority opinion, as it is from the majority opinion, that the Brotherhood has a constitutionally protected right to refer its members having FELA claims to attorneys where the Brotherhood is not compensated for the referral and does not control counsel's compensation, or the litigation.

IV.

THE ACTIVITIES OF THE BROTHERHOOD ARE NOT UNLAWFUL AND DO NOT LOWER THE ETHICAL STANDARDS OF THE PRACTICE OF LAW.

The Petitioner concedes that the State of Virginia may regulate the practice of law to insure the highest ethical standards, but Petitioner's present activities do not threaten ethical standards of the Legal Profession. Since the opinion of the Supreme Court of Illinois. (In Re: Brotherhood of Railroad Trainmen, supra) the Brotherhood receives no contribution from Legal Counsel for the support of its Department of Legal Counsel, and it no longer sets the fee to be charged its members by attorneys.

The interest of Petitioner in seeing that its injured members and families of deceased members are directed to competent counsel is personal, not pecuniary. The interest was born of necessity, because the Brotherhood found that railroad claim agents were taking advantage of injured members, and further, that the average lawyer was inexperienced and unable to successfully handle claims under the FELA and Safety Appliance Act[18] against experienced railroad lawyers. (Plf. Exs. 12, 12A, 17, 27; R. 42, 48, 49, 779, 780, 781, 800, 810, 812, 814.)

The decision: (In re Heirich, 10 Ill. 2d 357, 140 N.E. 2d 825 (1957) further demonstrates why the Brotherhood was compelled to protect its members from railroad claim

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[18] In Petition of the Committee of Rule 28 of the Cleveland Bar Assn., 15 L.Abs. 106.
In re: Brotherhood of Railroad Trainmen, 13 Ill. (2nd) 391.

agents. There, in discussing the disbarment proceedings against a successful personal injury claimant's attorney, the majority of the court stated, at 130 N.E. 2d 836:

> We further take judicial notice of respondent's exhibit 48, rejected by the Commissioners, being a report of the Railroad Retirement Board to the senate committee on Interstate Commerce, which we believe bears directly on its proceeding. That report shows a general course of conduct and a highly antagonistic attitude of the railroads towards all employees who retain counsel to defend their rights; that in Federal Employers' Liability cases settled without counsel, 97% of the employees returned to work for the railroad; while if suit was filed, from 80% to 96% of such employees lost their jobs. * * * The report states in part: "In some cases indeed, the claim agents go much further with implied threats that if suit is filed, the claimant would never be able to work for any big company again, or would receive references so unfavorable as to amount to blacklisting." The report further states: "The experience for all cases in which bargaining could be measured in these terms is summarized in table 5. In non-attorney cases bargaining resulted in a settlement which was on the average of 60% to 78% higher than the initial offer. Where an attorney was engaged, the initial bid was on the average more than doubled before the case was closed. In cases where the attorney felt it advisable and persuaded his client to file suit, the gross amount recovered was on the average of three or four times larger than the figures originally named by the claim agent."
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> * * *

> We are compelled to the conclusion that this proceeding was more than an impartial investigation of unethical practices by a bar association with the sole desire to protect the public and the profession. The record indicates that it was an adversary proceeding between the railroads and one of their antagonists. The time and energy of the railroads devoted to this proceeding might well have been spent in perfecting a code of ethics for railroad claim adjusters and in requiring its observance, for the improper activities of claim adjusters develop the climate in which solicitation of the type complained of in this proceeding may thrive.

Statute and ethical standards do not prevent liability insurance companies from hiring attorneys to protect their commercial and property rights; and it is well known that banks and trust companies refer clients to attorneys who in turn are known to favor trust provisions in wills.

A regulation, canon or statute which condones legal assistance by one concerned with property rights and prohibits assistance to members of a non-profit organization, like the Petitioner, surely violates the equal protection clause of the Fourteenth Amendment. (See Mayflower Forms v. Ten Eyck, 297 U.S. 266; Skinner v. Oklahoma, 316 U.S. 585; Morey v. Doud, 354 U.S. 457)

It has not been shown that the decree restraining the Brotherhood from informing its injured members to consult and employ attorneys to protect their rights bears any reasonable relation to the end of maintaining the integrity of the judicial process or the ethical standards of the legal profession or that there is a compelling state interest within the state's constitutional power; therefore, those provisions

of the decree objected to are violative of the First Amendment freedoms and the due process and equal protection clauses of the Fourteenth Amendment Cf. Schwane v. Board of Bar Examiners, 353 U.S. 232; Konigsberg v. State Bar of California, 353 U.S. 252; Nebbia v. New York, 291 U.S. 502; Skinner v. Oklahoma, supra.

There should be no conflict between the interest of Virginia in the ethical standards of its Bar and the Brotherhood's interest in recommending competent counsel to its membership.

The Court is not being asked to decide whether or not Virginia may discipline an attorney for soliciting legal business among the membership of the Association which he represents.

The Petitioner did not understand that when the Illinois Court in re Brotherhood of Railroad Trainmen, supra, approved of the Brotherhood's making known to its members generally and to injured members and their survivors in particular, first the advisability of obtaining legal advice before making settlement of their claims, and second, the names of attorneys, who in its opinion, have the capacity to handle such claims, the Court was approving the blanket solicitation of claims of injured members by recommended attorneys.

The Illinois Court indicated in broad outline what the Brotherhood could do with respect to injury and death claims of members, and specifically said that the objective of the Brotherhood in seeking to secure competent legal representation of its members could be accomplished without lowering the standards of the legal profession.

V.

THE ASSOCIATION OF THE AMERICAN RAILROADS USES THIRD PARTY TECHNIQUE AGAINST THE BROTHERHOOD

The hand of the Association of American Railroads can be seen giving assistance to counsel for the Virginia State Bar in the prosecution of the Brotherhood, and its legal Counsel. Practically every witness who gave a deposition against the Brotherhood in this case admitted that a representative of the Association of American Railroads secured him as a witness for the State Bar. (R 147, 209, 255, 278, 324, 326, 327, 330, 368, 404, 567)

Counsel for the Virginia State Bar admitted in the record that he was being assisted by representatives of the Association of American Railroads. (R. 567, 634)

Therefore, it would not be unfair to infer that the Association of American Railroads has encouraged litigation against the Brotherhood and its Counsel in this case, since it would be to its advantage to prevent the Brotherhood from (1) telling its members to obtain legal advice before making settlement of their claims, and (2) referring their members to competent attorneys. For third party techinque of railroads see: Eastern R. R. President Conference v. Noerr Motor Freight Lines, 365 U.S. 127.

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(2) Whether the Federal Railway Act, which authorizes the Brotherhood to represent its members generally and specifically to handle their "grievances", creates such an interest in the Brotherhood, that it has the right to make known to its members the advisability of obtaining legal advice and to make known the names of competent counsel

in connection with rights of members under the Federal Employers' Liability Act, not withstanding any rule or doctrine of State law?

VI.

VIRGINIA CANNOT CONSTITUTIONALLY PROHIBIT THE BROTHERHOOD FROM INFORMING ONE ANOTHER OF FEDERALLY GRANTED RIGHTS AND REMEDIES.

The great body of federal labor law permits the organization of labor unions for mutual aid and protection. This right is granted the Petitioner here by virtue of the Railway Labor Act 45 U.S.C. § 151 et seq. It is squarely held to be the public policy of the United States in labor matters in the Norris-LaGuardia Act, 29 U.S.C. § 102 that the individual worker should be free from the interference, restraint or coercion of employers of labor, or their agents, in self-organization or in other concerned activities for the purpose of collective bargaining *or other mutual aid or protection*. These rights are also granted by the National Labor Relations Act which is in pari materia with the Railway Labor Act, *Order of Railway Telegraphers* v. *Ry. Exp. Agency* 321 U.S. 324, 346, 64 S.Ct. 582, 585 (1944).

The Brotherhood now asserts that the full ambit of the rights of association for mutual aid and protection necessarily includes the minimal rights to inform its injured members in the specific areas hereinabove referred to. (*Salt River Valley Water Users Association* v. *NLRB*, 206 F. (2d) 325). In this case the Court of Appeals for the Ninth Circuit held that the Zanjeros could in concert circulate a petition authorizing legal claims under the Fair Labor Standards Act of 1938. The Court said in holding the solicitation of these legal cases to be a protected concerted activity

"Thus in a real sense circulation of the petition was for the purpose of 'mutual aid or protection'. The Association argues that any legal rights to back pay on the part of the Zanjeros were individual rights and that therefore there could be no 'mutual' aid or protection. But the Association ignores the fact that 'concerted activity for the purpose of * * * mutual aid or protection' is often an effective weapon for obtaining that to which the participants, as individuals, are already 'legally' entitled."

The nature of the Petitioner's interest in compensation for the deaths and personal injuries suffered by its members is historical for defendant union is unique in that its very existence is founded on the concern developed by railroad employees for their injuried fellow employees and for the survivors of their fellow employees killed in railroad operations. This union was orignally formed to protect fellow employees and their widows from the disastrous consequence of railroad injuries and deaths. In the era in which the Brotherhood of Railroad Trainmen was first organized, the average life expectancy of a switchman was seven years. *Griffith, The Vindication of a National Public Policy Under The Federal Employes' Liability Act,* 18 Law and Contemporary Problems 160 at 163. The infant union was fraternal in nature and served the purpose of providing insurance benefits to members totally disabled, or to the next of kin of members killed in the railroad service. It was not until later that the burden of collective bargaining was assumed. Seidman, *The Brotherhood of Railroad Trainmen,* John Wiley & Sons (1962), page 2.

Because of its concern with the plight of the injured Trainmen and with the survivors of Trainmen suffering death on the rails, the Brotherhood of Railroad Trainmen

was largely instrumental in securing the passage of the Federal Employers' Liability Act, the Safety Appliance Act and other national remedial legislation involving work injuries suffered by railroad Trainmen. See Dissent of Justice Levine, *In re Petition of Committee on Rule 28 of Cleveland Bar Association*, 15 L. Abs. 106. In the Brotherhood's Convention of 1916, a resolution was passed calling for the establishment of a Legal Aid Department in the said Brotherhood. The purpose of such Department was to protect the members and secure for the injured members, or the widows of members killed in railroad service, the full benefits of the remedial Federal Acts. After similar resolutions in subsequent conventions, President A. F. Whitney of the Brotherhood caused a thorough investigation to be made in 1928 and 1929 and submitted the reports of the investigation and question of the formation of a Legal Aid Department to a vote of the constituent lodges of the Trainmen. The establishment of the Legal Aid Department was approved by the member lodges by a ratio of over 11 to 1. The newly established Department started to function on or about the 1st day of May 1930. The Supreme Court of Illinois correctly summarized the reasons for the establishment in stating (*Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163, 165, 1958):

> "There is no serious dispute as to the basic facts. In 1930 the Brotherhood established its 'Legal Aid Department'. It took this step because it felt that under pressure from railroad claim agents, the claims of its members resulting from injuries they suffered in their work were being settled for unfair amounts. Some of the railroads forced settlements by the threat of loss of employment. At the same time, the members were being solicited by lawyers of varying degrees of competence who sought to, and did, handle the

claims of members for contingent fees that sometimes ran as high as fifty per cent of the amount recovered."

The Illinois Court, however, found that the Railway Labor Act was not intended to overthrow the state "regulation" of the legal profession or of the unauthorized practice of law.

The Court committed basic and fundamental error in so holding. The question is not whether state "regulation" is to be overthrown but is, instead, a question of the interrelationship of state and federal interests. It is no answer to say that the federal interests will not be considered until the proponent of the federal interests establishes that the interest of the state has been obliterated. That "answer" announces a proposition of state rather than federal supremacy except when Congress openly and patently declares that it desires federal nullification of an entire body of state law.

As the Illinois Supreme Court states, the Brotherhood is authorized to represent its members before the National Railroad Adjustment Board or other appropriate tribunals in the processing of disputes growing out of grievances. But the Court was *clearly in error* when it stated that these injury and death claims are not the kind of dispute that the statute contemplates. "Disputes" is a broad term and includes some of these claims in the opinion of this Court. Mr. Justice Rutledge in *E.J. & E* v. *Burley*, 325 U.S. 711, 65 S.Ct. 1282 (1945) provided, and etstablished, the basis for the distinction between "major" and "minor" dispute under the Railroad Labor Act. Briefly, major disputes are matters to be resolved by collective bargaining while minor disputes must go to the National Railroad Adjustment Board. Speaking of the minor disputes as the second

of two classes, Mr. Justice Rutledge states at 325 U.S. 723, 65 S.Ct. 1290:

> "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of 'those covered by the collective agreement, *e.g., claims on account of personal injuries*'. In either case the claim is to rights accrued, not merely to have new ones created for the future." (Emphasis supplied)

Considering this Court's specific statement that "claims on account of personal injuries" are "minor disputes" within the meaning of the Railway Labor Act, it is seen that the court below was myopic in failing to perceive any conflict between federal and state law. On the contrary, that court conjured up non-existent conflicts between the plan of Petitioner and the canons of ethics. (This is accepting the Bar's assertion in its Brief opposing the petition for writ of certiorari that its case was not rested on the Virginia statutes defining and regulating the practice of law [p.10]; subsequently held invalid by this court in *NAACP* vs. *Button*, 371 U.S. 415). The court adopts the attenuated reasoning of the majority opinion in *Hildebrand* vs. *State Bar of California*, 36 Cal. 2d 504, 225 P. 2d 508 (1950). In that case, the California Court held that the practices of the Legal Aid Department at that time were proper in the individual case, but improper because the general over-all plan resulted in a "channeling" of legal work to the petitioners.

The court below also relies on such "channeling" as resulting since the inception of the legal aid plan in 1930 (Record 25, 26, 27, 28). Moreover, the court below enjoins any act or combination of acts, or any plan, design or pattern which results in a "channeling" of legal employment to any lawyer or group of lawyers (Record 27, 28),

For reasons adverted to above, such a broad decree must be held to be constitutionally invalid because of its infringement of the rights of freedom of speech and freedom of association. Considered apart from such rights, reliance on "channeling" is a hyper-technical method by which all successful attorneys could be held to have violated the canons of ethics. This is seen when the Supreme Court of California's opinion is examined closely. That Court criticized the plan in *Hildebrand* vs. *State Bar of California*, 36 Cal. 2d 504, 225 P. 2d 508 (1950) because:

> 1. The Brotherhood had been remunerated and compensated for soliciting, directing and influencing the employment of petitioners by its members by means of a 6% contingent fee contract.
>
> 2. The Brotherhood received remuneration and compensation other than money in obtaining advantages or benefits from the plan.

The benefits obtained were:

> 1. The law suits of its injured members were handled by experienced lawyers and by means of a basic plan the members obtained what might be called "wholesale rates".
>
> 2. The service reasonably constituted an inducing cause for attracting membership in the Brotherhood and the payment of dues to the Brotherhood.

Since the Hildebrand opinion, the separate contingent fee contract to the Brotherhood has been eliminated. Since *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163, 165 (1958), no financial connection of any kind between the Brotherhood and its Legal Counsel has been had. Since the passage of the 1951 amendment to the Railway Labor Act, the Brotherhood of Railroad Trainmen has been able to obtain additional members by acquiring collective bargaining contracts requiring such membership. *45 U.S.C.* § 15b Eleventh. Considering the tenuous nature of the decision of the California Supreme Court, and considering the many changes in circumstances, it is surprising that the court below enjoined the "channeling" of legal employment and relied on the California decision. In so doing, the court ignored the decision of the Supreme Court of Illinois and placed reliance on various Consent Decrees entered in other states. This reliance was fundamentally erroneous because it is elementary law that a Consent Decree has no value as a precedent. *Texas & P. R. Co.* v. *So. Pac. Co.*, 137 U.S. 48, 11 S. Ct. 10 (1890); *Freuehauf Trailer Co.* v. *Gilmore*, 10th Cir. 167 F. 2d 324, 330.

On the other hand, none of the contested cases have found the plan of the Brotherhood to result in a "channeling" of legal employment. Each of those cases have found the plan of the Brotherhood to be based on worthy motives and purposes. Even in *Hildebrand* vs. *State Bar of California*, 36 Cal. 2d 504, 225 P. 2d 508 (1950), the majority opinion held on the different facts that in the individual case there was a proper reference or a proper contact made by the attorneys. The dissents, of course, are classic statements of the interests of the Brotherhood engaging in mutual aid and protection of the rights of its individual

members. The courts in *Doughty* v. *Gills*, 37 Tenn. App. 63, 260 S.W. 2d 379, and *In re O'Neill*, D.C.E.D.N.Y., 5 F. Supp. 465 were careful to point out that the helpful nature of the plan to the injured member was freely conceded and that the decision did not purport to bind the Brotherhood. See also *In re Petition of Committee of Rule 28 of Cleveland Bar Association*, 15 L. Abs. 106, 107.

Despite the unanimity of the opinion in the contested cases that the plan of the Brotherhood was established with proper motives, the court below found that the Brotherhood was improperly motivated throughout the operation of the legal aid plan and that the Brotherhood had never modified the said plan; relying particularly on the alleged admission made by the Brotherhood in its Answer. This is not suprising since the Bar in opposing the petition for writ of certiorari states that the legal aid plan was established for the purpose of obtaining monetary benefits by means of the 5% share in the original plan to cover the expenses of investigating the individual claims (Brief, p. 10).

Such statements, of course, are directly contrary to the finding of the Illinois Appellate Court in *Ryan* vs. *Pennsylvania Railroad Co.*, 268 Ill. App. 364, 374 (1932):

> "After a careful consideration of all the facts we are satisfied that these contentions and arguments are without merit, and we feel impelled to say that the assertion that the Brotherhood, through its legal aid department, is akin to an ambulance chaser and that the petitioner was a beneficiary of an unethical and unlawful system of obtaining clients, is unworthy of the able lawyers who made it. The Brotherhood is a labor organization, composed of men engaged in haz-

> ardous occupations and who are banded together for mutual protection and advancement. The evidence establishes that it organized the legal aid department for the sole purpose of protecting its injured members or their families in the matter of claims growing out of injuries sustained in the course of employment. The argument that the legal aid department was a solicitation scheme by which petitioner 'obtained many personal injury cases' is a most unfair one and entirely unwarranted under the evidence. The evidence, introduced by respondent, shows clearly the worthy purpose of the department and the necessity for its organization and maintenance."

The extreme conjecture used by the court below in arriving at its unwarranted conclusions is reminiscent of that indulged in by the Virginia Courts which was held invalid by this Court in *NAACP* vs. *Button*, 371 U.S. 442 (1963). It is submitted that the interests of labor unions are completely disregarded when such speculation and conjecture becomes the basis of injunctive relief. The English Courts for many years found nothing unethical in labor unions providing legal aid for their members. See Weihofen, *"Practice of Law" by Non-Pecuniary Corporations: A Social Utility*, 2, Univ. Chi. L. Rev. 119, 127 (1934). There is something wrong with rules which can be so misconstrued to defeat legitimate labor union purposes. See *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 Univ. Chi. L. Rev. 674 (1958).

The nature of the instant dispute as a dispute between capital and labor is shown by the extreme care and attention given this case by the Association of American Railroads. Practically every witness in the case was discovered and

interviewed by the association. The Bar's use of such assistance became so recognized by the court below that it forbade access to exhibits by said association. The Bar, of course, will contend that it is entitled to accept assistance from anyone. but it is equally clear that assistance is accepted only in cases against such unpopular groups as labor unions. The acceptance of such assistance is historical and has often resulted in situations where the organized bar is opposed to the organized labor unions. Because of such combination, the Bar again finds itself acting as an agent of the railroads contrary to the federal labor policy in attempting to deny to petitioner its federal right to organize for mutual aid and protection.

In doing so, the Bar is, of course, attempting to express its self-interest by means calculated to grant Virginia lawyers property rights in the cases of members of Trainmen injured in the state of Virginia. But one thing is certain, the Association of American Railroads is not aiding the Bar here in order to assist the pecuniary interests of Virginia lawyers. It, of course, is relying on the fact that claims under the Federal Employers' Liability Act are not self-executing and that there is no compensation board which will unilaterally see that the statute is made effective. Since the battlefield between employer and employee, by Act of Congress, is made the courtroom insofar as employee injuries are concerned, the Petitioner cannot fulfill its responsibilities in procuring employee benefits without informing, or placing its members in a position to be properly informed by qualified lawyers, of their legal procedures, rights and remedies. As Mr. Justice Frankfurter observed in *Assoc. of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.* 348, U.S. 437, 457, 75 S.Ct. 489, 499:

> "If the union * * * is impotent to procure for the employee the benefits promised then it is bound to lose their support."

Indeed, this Court has recently decided that the unions may sue directly to enforce the collective bargaining contract and that the employee alternatively may sue individually on his grievance. *Smith* vs. *Evening News*, 371 U.S. 195, 83 S.Ct., 267.

Petitioner, however, has not sought any control over the personal injury claims of its members. It has, instead, sought to recommend lawyers with the member being entirely free to accept or reject such recommendation. The ruling of the court below is extremely unclear. It was suggested below that the State Bar had no power to proceed except in matters involving the unauthorized practice of law. No practice of law by the union is here involved. There is no conflict of interest between the Union and the injured member such as to bring into effect Canon 35, American Bar Association, dealing with intermediaries. The employment accepted as legal counsel is not an employment by the union but is, instead, a designation which may or may not result in an employment by an individual member or members.

The Decree below goes beyond anything in the Canons of Ethics in that is proscribes mere recommendation by a group, or its members, of an attorney who represents the group. This is so even though the attorney's compensation is derived exclusively from the referred client and is dependent upon the making of voluntary arrangements directly between the attorney and the referred client. No

support for the Decree can be derived from Canon 35. See Drinker, *Legal Ethics* 162 (1953).

Henry S. Drinker, Chairman of the Standing Committee on Professional Ethics, American Bar Association, in his classic work *Legal Ethics*, Columbia University Press, (1953), at page 167 states that the Canon should not prevent labor unions from finding lawyers to advise the members and specifically discusses the legal aid plan of the Brotherhood of Railroad Trainmen. In other labor areas the employees work in a common plant and are very easily referred to their labor union lawyer. See *Labor Union Lawyers: Professional Services of Lawyers to Organized Labor*, 5 Industrial and Labor Relations Review 343, 361 (1952). As the commentator states in *Legal Ethics and the Labor Union*, 46 Ill. L.R., 323, 325, (1951), in commenting upon the Hildebrand decision:

> "To date most labor unions have not found it necessary to adopt formal legal aid plans. Though the formal arrangement is lacking, members still turn, usually, to the union's attorney for aid in their personal injury matters. Significantly, such has not been the result in the absence of a formal plan in the railroad industry. The peculiar characteristics of the railroad industry explain this difference. The Brotherhood's member is subjected to many working hazards. He works as an individual or in small groups and in many instances must travel from place to place. It becomes apparent that when an on-the-job injury occurs, oral directions as to proper legal action are not available to the injured as is the case in those industries where a union steward may be present to make the recommendation. Left on his own, the

> individual can well fall prey to the incompetent lawyer and the omnipresent claim agent thereby losing whatever damages are rightfully his. The public policy embodied in workmen's compensation and federal employer's liability legislation demands that full retribution for the injury be received by the injured. If such a goal cannot be achieved on an individual level, the mere use of a collective mechanism (the union) certainly should not alter the validity of the underlying policy. It is anomalous to say that, though the legislation is sound, the underlying policy creditable, and the effectuating mechanism adopted for most purposes acceptable, yet a significant number of people must nevertheless take less than their due because operation under the mechanism may possibly subvert the morals of attorneys."

More than at any other time, the injured employee reasonably expects his union to stand by him and especially to protect his right to employment when he has recovered. The injured employee should not be compelled to choose between his job and his rights under the FELA. This choice, however, has been and continues to be the railroads objective. The injury itself under railroad rules in the past terminated the contract of employment. See *Culver* v. *Kurn*, 354 Mo. 1158, 193 S.W: 2d 602 (1946). Later, the railroads relied on principles of "promissory estoppel" said to be involved in any settlement or judgment where the employee had claimed serious injury. See Award 17454, Volume 135, Awards of First Division, NRAB (1956). Lately, the railroads have been relying on "misrepresentation" in the application for employment as grounds for discharging employees who retain attorneys. See Award

19557, Volume 144, Awards of First Division, NRAB (1960).

Petitioner Brotherhood, of course, must prosecute these claims for reinstatement even though the employee retained attorneys other than Legal Counsel. Recently, the Petitioner Brotherhood filed a brief *amicus curiae* in the U.S. Supreme Court in a case of a negro member of Trainmen who had been discharged by the railroad because of alleged "misrepresentations" in his application for employment. When his case came to trial, the lower court directed a verdict against him because of the "misrepresentations". The Brotherhood urged in its brief that this defense be eliminated and that the Court declare that his rights as an employee be made absolute. The Court eliminated this defense in FELA actions except where the employee applies by using an imposter. *Still* v. *Norfolk & Western R. Co.*, 368 U.S. 35 82 S.Ct. 148 (1961). This Court thereby eliminated the basis in legal theory for the First Division's ignoring of the collective bargaining provisions which customarily make the applicant an employee if not rejected during a period of 30, 60 or 90 days.

The Brotherhood not only has the burden of protecting the injured employee's right to his job, but the interest of the Brotherhood in some cases is more direct and immediate because of the shadowy no man's land of distinctions between Railway Labor Act "grievances" and FELA "personal injuries." See *Butler* v. *Smith*, 104 So. 2d 868, 869 where the Florida Appellate Court held that the injured employee could not question the propriety or right of the railroad to give him the field test on which he was injured, but held that he had a remedy for such "grievance" under the Railway Labor Act. The petition for certiorari was

granted but dismissed after oral argument by the U.S. Supreme Court by a vote of 5 Justices against 4 on the ground that the litigation did not turn on the issue of the interrelationship of the Railway Labor Act and the FELA. The termination of that case, however, does not give support to the Illinois Supreme Court's earlier finding that FELA actions are not like the labor disputes contemplated by the Railway Labor Act. See *Smith* v. *Butler*, 366 U.S. 361, 81 S.Ct. 937 (1961).

The Canons of Ethics convey the image of a small town Bar. These conditions, of course, do not exist today in our largely metropolitan and urban civilization. Carlin, *Lawyers on Thier Own*, Rutgers Univ. Press (1962) p. 156, 157. In our complex society, voluntary associations are experiencing an important urgency to make available to one another coordinated legal information of a reasonably uniform quality. This is unquestionably because such associations have found by experience that, left to their own resources, individual members may receive either incompetent legal assistance or may be deprived of their legal rights. A perfect example of this combining to receive better legal services is found in the railroad industry itself, where the Association of American Railroads maintains an elaborate Law Department to handle litigation, Governmental relations and other matters of a legal nature of general interest to the members of the Association. When called upon, the Association of American Railroad's Law Department gives advice not only to the A.A.R. Board of Directors, but to member roads and representatives from roads in matters of common concern before the Courts, the Interstate Commerce Commission and other administrative bodies. It keeps member roads informed as to proposed laws and maintains a General Claims Division which is

concerned with the Federal Employers' Liability Act claims of injured employees. (See: p. 80, Stipulation No. 52 of the Record in *Kennedy, etc., et al* v. *The Long Island Railroad Company, etc., et al,* Petition for Writ of Certiorari filed July 26, 1963, Docket No. 312). None of the States or bar associations have challenged the right of this voluntary association to supply these legal services to its members, although substantial legal business of the individual railroads is thereby channeled to the lawyers employed by the A.A.R. in a most direct and efficient manner.

There is nothing in the plan of the Petitioner which requires, compels and binds its members to recommend a particular lawyer to a fellow-employee. Many members recommend attorneys other than those designated under the legal aid plan for reasons of their own. This is in keeping with the general nature of the plan which is a voluntary association for the mutual aid and protection of the member in exercising rights granted by the Federal Employers' Liability Act. The plan has been changed to meet objections raised against it in the past 33 years. It is a plan of such freedom for the individual members in his choice of counsel that it is difficult to imagine any plan which, within the context of freedom, would more perfectly accommodate the interest of the Petitioner and of the injured member of the Petitioner with the interests of the organized bar. If the present plan is not possible, it is impossible solely because the Petitioner has an interest in the premises which will not be recognized by the organized bar.

CONCLUSION

For reasons stated above, it is respectfully submitted that the judgment below should be reversed and that this Court

should hold the Petitioner, its officers, agents, servants, employees and its members may make known to its members, generally, and to injured members and survivors of deceased members in particular, first, the advisability of obtaining legal advice before making settlement of their claims arising out of railroad accidents, and second, the names of attorneys, who in their opinion, have the capacity to handle such claims successfully and that these rights are protected by the First and Fourteenth Amendments to the Constitution of the United States, and the Railway Labor Act.

Respectfully submitted,

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A Separate Certificate is being made by counsel for the Petitioner, showing that three copies of this brief have been delivered to counsel for the Virginia State Bar.

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